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Office of the United States Political Adviser in Japan,
Tokyo.

MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau
Mr. Mikizo NAGAI, Chief, Sixth Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser, Tokyo, Japan.

Date: Thursday, April 3, 1952 THIRTEENTH INFORMAL MEETING

ARTICLE XVIII

Mr. Otabe stated that in the near future associations might be formed with the approval of the Government for the sole purpose of assisting industries and the Government in their efforts to prevent dumping, the mis-use of industrial property rights, or other unfair business practices. He added that under a proposed Export Trade Transactions Bill (soon to be presented to the Diet for consideration) export associations could be formed with the approval of the Minister of International Trade and Industry and could conclude agreements with respect to price, quality and quantity of commodities exported to a specific country. Such agreements would be approved by the Government when they were designed to: (a) control export prices whenever these

are considerably lower than domestic prices of similar commodities in countries of destination; (b) control export prices whenever there is danger of rapid fluctuation; (c) establish price or other necessary controls whenever advisable as a result of restrictions on import transactions by countries of destination. He pointed out that the proposed bill is regarded as an implementation of fair-trade principles, and that such associations and agreements would therefore be permitted as an exception to the existing Law relating to the Prohibition of Private Monopoly and Methods of Preserving Fair Trade. He inquired whether the activities of such associations would be construed as having a harmful effect upon commerce between the two countries with reference to Article XVIII.

Mr. Adams stated that it was his understanding that the activities of such associations would be controlled through Japan's proposed Export Trade Transactions Law and the existing Trade Association Law (which will reportedly be amended in the near future to cover non-profit organizations only) or the Anti-Monopoly Law. He added that it was believed that any commercial or industrial association having "police" functions within its field of commerce or industry (as distinct from "control" functions) for the purpose of assisting the Government to implement fair trade practice principles would not be prohibited under the terms of Article XVIII.

Mr. Otabe then asked whether shipping conference would be prohibited by this Article. Mr. Singer replied that shipping conference activities were permitted by the United States subject to regulations quite similar to those of Japan. A conference operating under such regulations was not considered to have a harmful effect on commerce. Conference activities would be in violation of Article XVIII, however, when they restrained competition, established monopolistic controls, engaged in practices ascribed to the closed conference system, or when they otherwise had a harmful effect on commerce.

Mr. Otabe then stated that Japan believed that its public enterprises engaged in certain trading and manufacturing activities were not in violation of Article XVIII. He stated that these Government enterprises, and the laws regulating their activities were as follows:

a. Law Concerning the Special Account for the Printing Agency, which provides:

> "Article 1. A Special Account shall be established and accounted separately from the General Account in order to manage the business of the Printing Bureau on an enterprise basis and to promote the sound business of the Account."

b. Law Concerning the Special Account for Precious Metals, which provides:

"Article 1. A Special Account shall be established and managed separately from the General Account for the purpose of clearing the management concerning the purchase, sale or custody of the precious metals by the Government. In the present Law, 'precious metals' shall mean gold, silver, platinum, ruthenium, rhodium, palladium, osmium, iridium and iridosmin."

c. Law Concerning the Special Account for State Forestry Service, which provides:

"Article 1. A Special Account shall be established separately from the General Account in order to operate the national forestry-work on an enterprise basis and to promote the sound development of the Account.

"National Forestry work in this Law covers the business of control and management of the national forestry in Article 2 of the National Forestry Law, with other miscellaneous minor business attached thereto."

d. Law Concerning the Special Account for the Important Goods Import Fund, which provides:

"Article 1. There shall be established the Important Goods Import Fund in order to expedite the acquisition and sale of the goods produced abroad and needed urgently by the Government, and a Special Account shall be established in order to manage the accounting concerning its operations as distinct from the General Account."

All of these, stated Mr. Otabe, fall within the category of the public enterprises covered by Article XVIII, paragraph 2. However, because of the very nature of these enterprises, their activities and the special treatment accorded to them were not regarded as coming in conflict with the provisions of Article XVIII.

Mr. Adams stated that Mr. Otabe's description of the operations of these public enterprises or official agencies clearly indicated that they were not in competition with private business. In the event some of their activities might compete with certain private enterprises, conditons of competitive equality should be maintained. The activities of these publicly owned or controlled enterprises would not, under such circumstances, be in violation of the provision of Article XVIII.

Mr. Otabe then asked for a clarification of the term "government instrumentalities" as used in paragraph 3 of this Article. He stated that the Bank of Japan is often designated to conduct certain governmental functions on behalf of the Ministry of Finance or the Foreign Exchange Control Board. He then asked if the Bank of Japan, like the United States Federal Reserve Banks or the Export-Import Bank and others, was to be identified as an official "instrumentality".

Mr. Bassin replied that this term was practically synonymous with "government agencies". He added that the institutions mentioned by Mr. Otabe, including the Bank of Japan, were regarded as "government instrumentalities".

ARTICLE XIX

Mr. Otabe stated that the clause referring to coasting trade, inland navigation and national fisheries in the latter part of paragraph 3, Article XIX, is considered to be a matter related to navigation in general. He suggested that this reservation be provided for in a separate paragraph. He proposed that this reservation be expanded, but that the reference to "national fisheries" be included in paragraph 6, where he believed it would be more appropriate.

Mr. Nagai inquired if paragraph 3 and 4, when taken together, mean that the vessels of either Party may proceed from one port (including places and waters) to another port (also including places and waters) of the other Party which are or may hereafter be open to foreign commerce and navigation, either for the purpose of landing the whole or part of their cargoes, or passengers, brought from abroad, or of taking on board the whole or part of their cargoes, or passengers, bound for a foreign destination. Mr. Singer replied that Mr. Nagai's interpretation was correct.

Having received this clarification of paragraph 3 and 4, Mr. Otabe proposed that the final clause of paragraph 3 be deleted, and that the following be incorporated in Article XIX as paragraph 7:

> "The coasting trade and inland navigation of either Party shall be regulated according to its respective laws and shall be excepted from the provisions of the present Treaty. It is, however, understood that the vessels of either Party shall enjoy in this respect most-favored-nation treatment in the territories of the other Party, but that this benefit shall be granted only on a reciprocal basis."

Mr. Adams stated that the deletion of "national fisheries" from the present clause in the standard draft's paragraph 3 was acceptable on a tentative basis, since Mr. Otabe had stated that this point would be raised in connection with paragraph 6. He asked for an explanation, however, of the additional phrase on reciprocity which is not now included in the standard draft.

Mr. Otabe replied that it was assumed that the United States would not grant any rights or privileges in connection with its coasting trade and inland navigation to the nationals of any foreign country. He added that the present United States-Japn FCN Treaty would establish a precedent for Japan's FCN Treaties with other countries, and that it was desired therefore that this provision be so amended in order to allow Japan to negotiate for the extension of certain coasting trade rights on a reciprocal basis. Mr. Otabe stated that although Japan's coasting trade had generally been reserved to its own nationals it might be to Japan's advantage to negotiate with certain Powers, particularly those with colonial possessions in the Far East, for certain limited coasting trade rights. These would possibly (but not necessarily) be limited to the carriage between coastal ports of cargoes imported and cargoes for eventual export under a system which would combine the features of in-transit and coastal shipping. He added that informal discussions along these lines were already taking place. Mr. Otabe stated that the wording proposed for a new paragraph 7 was therefore desired by Japan in place of the present clause in paragraph 3, and that he believed it should not be objectionable to the American side.

Mr. Otabe further inquired in this connection whether inter-island trade within the territories of either Party was considered to be coasting trade. Mr. Singer replied that inter-islands trade was so considered.

Mr. Adams pointed out that the standard draft clause provides for most-favored-nation treatment with respect to coasting trade, and that the word "exclusive" means simply that coasting privileges may be withheld only so long as they are not extended to any third country. In view of the substantially different clause now proposed by the Japanese, Mr. Adams suggested that the deletion from paragraph 3 of the clause under reference and the inclusion of a new paragraph 7 be recorded provisionally in the working draft of the FCN Treaty for the purpose of these informal discussions. He added that these changes would be referred to the Department of State for its consideration.

Mr. Otabe stated that with respect to paragraph 5, concerning vessels in distress, the Japanese side would prefer to employ the phraseology of Article XV of the Japanese draft, because the provisions of the latter were considered to be more specific. He suggested therefore that the following be substituted for paragraph 5 of the standard draft:

> "The vessels of either Party, in case of shipwreck, stranding, or of being forced to put into the ports, places or waters of the other Party, whether or not open to foreign commerce and navigation, shall enjoy the same assistance and protection as are in like cases enjoyed by the vessels of such other Party and of any third country, and shall not be subject to any duties or charges other than those which would be payable in like cases by the vessels of such other Party

or of any third country. The cargoes of such vessels of either Party and all articles salvaged from them shall not be subject to the payment of customs duties unless they are imported into the territories of the other Party."

Mr. Adams stated that this proposal would also be referred to the Department of State for its consideration.

Mr. Otabe asked on what grounds the provision of "national fisheries" was specifically made in this Article.

Mr. Bassin replied that many treaties of commerce and navigation either state that their provisions do not apply to fisheries, or else specifically except the "national fisheries" from grants of national or most-favored-nation treatment. Presumably this exception is included as an assertion of the sovereign right of a state to reserve to its own nationals the benefits and privileges of its national resources, and at the same time to control the exploitation of national fisheries so as to preserve an important food supply. This assertion is a commonly recognized principle in international law and relations and is, of course, subject to the rights of other states, which rights are established by treaty or otherwise.

Mr. Otabe then said that it was proposed that paragraph 6 be amended, substantially along the lines of paragraph 2, Article XIX, of the United States FCN Treaty with Italy. He added that it was believed appropriate to include the reservations with respect to national fisheries in this paragraph rather than in the final clause of the standard draft's paragraph 3 or in the newly proposed paragraph 7. Mr. Otabe proposed that paragraph 6 be revised as follows:

"The term 'vessels', as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated. However, the provisions of the present Treaty, other than paragraphs 2 and 5 of the present Article, shall not be construed to accord rights to vessels of war or fishing vessels, nor shall they be construed to extend to nationals, companies and vessels of the other Party any special privileges reserved to national fisheries."

Mr. Nagai added that it was understood that "fishing vessels" included not only the vessels actually engaged in fishing but also those engaged in marine exploration connected with national fisheries as well as those engaged in the transportation of the catch. Mr. Singer inquired whether Mr. Nagai's question on transport of the catch referred to mother-ship fishing operations. Receiving an affirmative reply from Mr. Nagai, Mr. Singer stated that such operations and marine exploration activities were included within the definition of national fisheries, and that vessels engaged in these operations properly came within the scope of the term "fishing vessels".

With reference to Mr. Otabe's suggestion that, since Japan does not have warships, the Japanese side would like to avoid the use of the term "vessels of war" in the FCN Treaty if possible, Mr. Bassin stated that this term was normally employed in treaties of this type. He added that the right of refuge of warships in distress would not be exercisable in a manner inconsistent with the rules of international law.

Mr. Adams stated that the new paragraph 6 proposed by the Japanese side would be entered in the working draft of the Treaty for the purposes of these discussions, and would be referred to the Department of State for its consideration.

It was agreed that the next meeting would be held on Monday, April 7, 1952, with discussions to begin on Article XX.

/s/ M. Yukawa

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/s/ Frank A. Waring

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